IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7367 of 2003

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MAHERSING OR HIS SUCESSOR IN OFFICE INTELLIGENCE OFFICER
Versus
PRADIPKUMAR BHARATLAL PODDAR DIRECTOR OF M/S SUVIDHA

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W I T H

CRIMINAL REVISION APPLICATION No 455 of 2003

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PRADIPKUMAR BHARATLAL PODDAR
Versus
MEHAR SINGH OR HIS SUCCESSOR IN OFFICE INTELLIGENCE OFFICER

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For Approval and Signature:

HON'BLE MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be c
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Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals?

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Appearance:
1. Criminal Misc.Application No. 7367 of 2003

MR ASIM J PANDYA for Petitioner No. 1
MR BB NAIK for Respondent No. 1
MR VM PANCHOLI, ADDL. PUBLIC PROSECUTOR for Respondent No. 2

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1. Criminal Revision Application No. 455 of 2003
MR BB NAIK for Petitioner No. 1
MR ASIM J PANDYA for Respondent No. 1
MR PR ABICHANDANI, ADDL. PUBLIC PROSECUTOR for Respondent No. 2

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CORAM : HON'BLE MR.JUSTICE A.L.DAVE

Date of decision: 24/09/2003

COMMON C.A..V. JUDGEMENT

1. Rule. Learned advocate Mr. B.B. Naik and Mr. V.M. Pancholi, learned Additional Public Prosecutor waives service of rule on behalf of the respective respondents in Criminal Misc. Application No. 7367 of 2003. Learned Standing Counsel for Central Government Mr. Asim Pandya and Mr. P.R. Abichandani, learned Additional Public Prosecutor waives service of rule on behalf of the respective respondents in Criminal Revision Application No.455 of 2003.

2. These two matters, in substance, arise out of, and challenge an order passed by the the Chief Judicial Magistrate, Surat on September 10, 2003 in a bail application preferred by Pradipkumar Bharatlal Poddar in Anti Evasion File No. V/15-20/DGCEI/VAPI/2001/Part II.

3. The facts of the case in brief are that the said Pradipkumar Bharatlal Poddar is a Director of Suvidha Polyster Pvt. Ltd., [hereinafter referred to as the said Company] which is a 100% Export Oriented Unit [hereinafter referred to as the E.O.U], enjoying special facilities in the form of exemption from excise duty under the Excise Act. The said Company being a 100% E.O.U., is expected to export its entire manufacture to avail of the exemption facilities. It is alleged that the Company has, without exporting 97 consignments to Nepal, falsely claimed the benefits. The returns and submissions made in this regard to the department are fake and false. The department learnt about the duty evasion on making certain inquiries, particularly after verification from certain authorities at Nepal. It is alleged that the party to which the export is alleged to have been made, viz. Jugal Exports, is also probably non-existent as the Company is not able to give any

details thereof. The said Mr. Pradipkumar Bharatlal Poddar, therefore, came to be arrested on September 4, 2003. He preferred the said application before the learned Chief Judicial Magistrate, Surat on the same day. The said application, after hearing the other side, came to be disposed of on 10th September 2003 by the learned Chief Judicial Magistrate, Surat, whereby bail was granted to Pradipkumar Bharatlal Poddar upon certain conditions. One of the conditions was that he shall pay 25% of the alleged duty evasion out of which, Rs.23 lakhs would be deposited in the department under protest forthwith, and on production of receipt of such deposit before the Court, and on further deposit of Rs.1 lakh in cash with the Court as cash security, besides furnishing solvent surety to the tune of Rs.50,000/-, and executing a personal bond of the like amount, Pradipkumar Bharatlal Poddar was ordered to be enlarged on bail. The remaining amount out of 25% of the alleged duty evasion was ordered to be paid within 3 months from the date of release. Certain other conditions are also imposed while granting bail.

4. Being aggrieved by the said conditions in the order, Pradipkumar Bharatlal Poddar has preferred Criminal Revision Application No. 455 of 2003, under section 397 read with section 401 of the Code of Criminal Procedure, challenging the imposition of conditions of pre-deposit of Rs.23 lakhs, deposit of the remaining amount of 25% alleged duty evasion within 3 months from the date of release, and deposit of Rs.1 lakh as cash security. Hereinafter, he shall be referred to as the Revisioner.

5. The Department has preferred Criminal Misc. Application No. 7367 of 2003 under section 439 (2) read with section 482 of the Code of Criminal Procedure, seeking cancellation of bail.

6. Considering the peculiar nature of the matters and considering the fact that both the Applications arise out the same order, by consensus, both the matters are heard together finally and are disposed of accordingly by this common judgment and order.

7. Learned Standing Counsel Mr. Pandya appearing for the Central Excise Intelligence Department submitted that here is a case where the learned Chief Judicial Magistrate has erred in exercising judicial discretion in granting the bail. The accused is involved in such duty evasion repeatedly. There are two other instances of tax evasion wherein he had been involved. It is an economic

offence involving stake of Crores of Rupees. The learned Chief Judicial Magistrate should have considered these adverse factors and should have rejected the bail as presumption of innocence is not available to the accused-Revisioner considering his repeated involvement in duty evasion. He further submitted that powers under section 439 (2) can be exercised to rectify an error that may have been committed by the lower Court, if the order is found to be perverse. He further submitted that the learned Chief Judicial Magistrate has ignored the fact that it is an economic offence affecting the economy of the country. The present offence is a successive offence and the stake involved is very high. He submitted that the bail granted may be cancelled.

7.1 By way of alternative submission, he submitted that if the Court is not inclined to cancel the bail, then the conditions imposed by the earned Chief Judicial Magistrate is just and proper. Law empowers the Court to impose conditions while granting bail. As against a total evasion of almost Rs. 4 Crores, only Rs.23 lakh is ordered to be deposited. The amount is ordered to be deposited only to ensure that there is no evasion in future. He therefore submitted that the Criminal Revision Application filed by Pradipkumar Bharatlal Poddar may be dismissed.

8. On the other hand, learned advocate Mr. Naik for the accused Pradipkumar Bharatlal Poddar has emphasized on the fact that though the investigation is going on since February 2002, till date neither any show cause notice is given nor is there any adjudication on the question of the alleged evasion, nor has any complaint been filed in this regard. It is not certain as to when these steps would be taken, and at this stage, there is nothing except bald allegations based on some information received from tax authorities of another country, Nepal, that the consignments have not reached Nepal. Mr. Naik submitted that records of the authorities of the Customs and Excise Department of our country at various places have in terms certified that 97 consignments have been exported, and there are entries to that effect in the Registers maintained by the said departments. Mr. Naik, therefore, submitted that the bail is rightly granted by the learned Chief Judicial Magistrate. The accused cannot be kept in jail perennially till the Department takes action at its own convenience and therefore the Criminal Misc. Application filed by the department is required to be rejected.

8.1 However, as regards the conditions imposed by the

learned Chief Judicial Magistrate, learned advocate Mr. Naik submitted that in the light of the settled provisions of law by various pronouncements of the Apex Court, the conditions of cash security could not have been imposed by the learned Chief Judicial Magistrate. He further submitted that the learned Chief Judicial Magistrate has proceeded on the premises that there is a tax evasion and, therefore, a direction is given to deposit 25% of the duty evaded out of which Rs.23 lakhs is ordered to be deposited as a condition precedent for enlargement on bail. He submitted that there is separate machinery for adjudication of the alleged evasion and recovery. Such authority will adjudicate upon that question as to whether there is in fact evasion or not. He also submitted that the department itself is not sure since no show cause notice is yet given about the said alleged evasion. Apart from that, the learned Chief Judicial Magistrate has also ordered to deposit Rs.1 lakh as cash surety in the Court. The Apex Court did not appreciate such order in one of the cases before it. He further submitted that imposition of such conditions is as good as denial of bail. Mr. Naik further submitted that these are criminal proceedings, independent of recovery proceedings, and the learned Chief Judicial Magistrate seems to have transgressed on the other jurisdiction of recovery. He, therefore submitted that the conditions of cash deposit with Department and cash security are required to be deleted.

9. Having regard to the rival side contentions, as regards question whether the bail has been wrongly granted by the learned Magistrate and whether it can be cancelled by this Court under section 439 (2) of the Cr. P.C., it would be appropriate to note at this stage that the law on this question is well settled that bail once granted can be cancelled only in cases where there are overwhelming, cogent and compelling circumstances. Learned advocate Mr. Pandya appearing for the applicant-Central Excise Department could not indicate presence of any such factors. On the contrary, he, in all fairness submitted that the averments made in the application for cancellation of bail to the effect that there is misuse and abuse of liberty on the part of the Revisioner, is made on some erroneous information, and is not correct. He submitted that he does not press this contention.

10. However, Mr. Pandya was very emphatic about the error committed by the learned Chief Judicial Magistrate in grant of bail. He submitted that the learned Chief Judicial Magistrate lost sight of the fact that the

applicant is involved in similar offences earlier, and the presumption of innocence is, therefore, not available to the Revisioner. Mr. Pandya, therefore, submitted that the learned Chief Judicial Magistrate has committed an error and this Court must exercise its jurisdiction under section 439 (2) of Cr. P.C. and cancel the bail looking to the gravity of offence. He submitted that the offence is an economic offence. It affects the public exchequer and ultimately the economy of the country and it must be seriously viewed. He placed reliance on the decision of the Apex Court in the case of PURAN vs. RAMBILAS reported in AIR 2001 SC 2023 where the Apex Court observed that where bail is granted ignoring material evidence on record by a perverse order in a heinous crime, it would be an order against principles of law and interest of justice would require that such a perverse order be set aside and bail be cancelled. The Court may correct an arbitrary or wrong exercise of discretion by the trial Court in exercise of powers under section 439 (2).

11. Mr. Naik has, on the other hand, placed reliance on several decisions of the Apex Court to indicate that powers to cancel bail must be exercised with great care and circumspection and in appropriate cases where it is indicated by preponderance of probability that accused is interfering with the course of justice by tampering of witnesses such power should be exercised.

12. In a recent case of MAHANT CHAND NATH YOGI vs. STATE OF HARYANA reported in (2003) 1 SCC 326, the Apex Court took a view that normally very cogent and overwhelming grounds or circumstances are required to cancel the bail already granted.

12.1 The Apex Court in the case of PURAN vs. RAMBILAS reported in AIR 2001 SC 2023 observed that where bail is granted ignoring material evidence on record by a perverse order in a heinous crime, it would be an order against principles of law and interest of justice would require that such a perverse order be set aside and bail be cancelled. The Court may correct an arbitrary or wrong exercise of discretion by the trial Court in exercise of powers under section 439 (2).

13. From the above discussion, it is clear that normally bail can be cancelled where cogent and overwhelming circumstances are indicated for exercise of such powers or bail can be cancelled where it is found that the order of the learned Magistrate of granting bail is perverse and in neglect or material evidence on

record.

14. In the instant case, it is demonstrated by learned advocate Mr. Naik that communications from various offices of the Customs Department have confirmed the export of the consignments which are allegedly not exported. He has drawn attention of this Court to Annexure 'A' Colly. received from office of the Assistant Commissioner of Customs, Land Customs Station, Sonauli, Jogbnani [Bihar], Maharajgunj [U.P] as well as Annexure 'C' to indicate that the consignments have been despatched as per the record of the Department, which tallies with the case of the Revisioner. There was nothing that was pointed out to this Court that these reports are non-existent. These are department's own records. Learned Chief Judicial Magistrate, therefore, cannot be said to have passed the order dehors the material on record.

14.1 The order of the learned Chief Judicial Magistrate, therefore, cannot be said to be perverse in any manner insofar as granting of bail is concerned.

14.2 It is also worth taking a note that though the raid was conducted in February 2001, till date the Department has neither issued any show cause notice nor is there any adjudication on evasion of duty. On a specific question put by this Court to learned Standing Counsel for the Central Government Mr. Pandya as to when the complaint would be filed or as to when the other proceedings would be commenced, he was at a loss to answer. Therefore at this stage, it is not certain as to whether after due inquiry there would be any recovery from the applicant.

14.3 There is total absence of any material to suggest any cogent or compelling circumstances calling for cancellation of bail and there is no reason for interference by this Court in the form of cancellation of bail in exercise of powers under section 439 (2) of Cr. P.C. The application for cancellation of bail, therefore, must fail.

15. Coming to the question of the legality or otherwise of the conditions imposed by the learned Magistrate in the order granting bail, at the outset, it would be appropriate to examine the relevant provisions of the Code of Criminal Procedure. The relevant provisions are contained in Section 441 of the Code, which relates to bond of accused and surety. The said provisions read thus:

"441. Bond of accused and sureties.-

(1). Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2). Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

(3). If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Sessions or other Court to answer the charge.

(4). For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficient or fitness."

16. It is amply clear from the above provisions that it contemplates execution of bond as may be directed by the Court or the police officer or provide one or more sureties, and it does not contemplate cash security. It would also be appropriate to refer to section 445 of Cr.P.C., which reads as under:

445. Deposit instead of recognizance._

When any person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing such bond.

17. A conjoint reading of sections 441 and 445 makes the position clear that a Court or police officer may

require execution of personal bond or furnishing of one or more sureties before a person is released on bail. Thereafter, such person so required by any Court to execute bond or without surety may pray to the Court to permit him to deposit a sum of money or government promissory notes of such amount as the Court may fix, in lieu of executing such bond, except in case where the bond is required to be executed for good behaviour. Thus, the provision for cash security is not contemplated under section 441. The option is with the person who is required to execute bond with or without surety to seek permission of the Court for cash security in lieu of execution of bond and thereupon the discretion is with the Court either to grant or refuse such permission. Differently put, the provisions do not empower the Court to impose a condition for cash surety.

18. In this regard, it would be appropriate to refer to certain judicial pronouncements. In the case of KESHAV NARAYAN v. STATE OF BIHAR reported in AIR 1985 SC 1666 the Apex Court observed that condition requiring the accused to furnish security for Re.1 lakh in cash or in fixed deposit in nationalized bank with two sureties residing in the State for the like amount as as good as denial of bail itself. Ultimately, the Apex Court ordered the accused to be released on bail on furnishing bail bond for Rs.25,000/_ with two sureties each for like amount.

19. Almost a similar situation which is before this Court was considered by the Apex Court in he case of SANDEEP JAIN vs. N.C.T. OF DELHI reported in AIR 2000 SC 714. There, the accused was charged for offences punishable under section 420 and 406 of I.P.C. Learned Metropolitan Magistrate ordered the accused to be released on bail on certain unusual conditions that at FIR stage, the accused should pay a huge sum of Rs. 2 lakhs to be set at liberty, in default thereof he was to languish in jail endlessly for his inability to pay the amount. The Apex Court observed that the said condition is onerous. The Apex Court observed as under:

> "We are unable to appreciate even the first order passed by the Metropolitan Magistrate imposing the onerous condition that an accused at the FIR stage should pay a huge sum of Rs. 2 lacs to be set at liberty. "

The Apex Court further observed that at that stage the Court had not even come to a conclusion that the allegations made in the F.I.R. are true. The

conditions were, therefore, modified.

20. The Apex Court in the case of MOTI RAM vs STATE OF MP reported in (1978) 4 SCC 47, while considering the provisions contained in sections 389, 436, 441 and 445 of Cr.P.C. observed that bail includes with or without surety. The Apex Court disapproved even insistence for sureties from his own District and also disapproved insistence for sureties in large amount.

21. In the case of BALBIR SINGH CHIB vs. SANJAY DAVE reported in AIR 2000 SC 3563 (1), the Apex Court set aside an order granting anticipatory bail on condition of deposit of Rs.10 Crores holding that the power is not exercised judicially. The direction was set aside and the matter was remanded to the High Court for re-disposal.

22. The provisions contained in sections 441 and 445 of Cr.P.C. came to be considered by the Madras High Court in the case of N. SASIKALA vs. ENFORCEMENT OFFICER, ENFORCEMENT DIRECTOR, MADRAS reported in 1997 CRI.L.J. 2120 wherein it was held that the Magistrate was not empowered to demand cash security. At the same time, the accused may be permitted to deposit a sum of money in lieu of executing a Personal bond and giving surety to some persons. In that case, a condition of deposit of Rs.2 lakhs was imposed, which came to be set aside.

23. The Andhra Pradesh High Court also had an occasion to consider the provisions contained in sections 441 and 445 of Cr. P.C. in the case of C. PRAKASH AGARWAL vs. STATE OF A.P. reported in 2000 CRI. L.J. 4310. There also it was held that the High Court of Investigating Officer may satisfy itself whether the sureties are fit and sufficient but it cannot insist upon cash securities or cash bonds. Imposition of such condition was held to be not proper.

24. The Madras High Court in the case of ALLUVDIN vs. INSPECTOR OF POLICE, VANDHAVASI POLICE STATION reported in 2001 CRI. L.J. 2672, while considering the provisions of sections 441 and 445 of Cr. P.C. held that imposing a condition of deposit of cash security along with execution of bond of two sureties was not permissible under law.

25. Similarly, a Division Bench of the Delhi High Court recently examined this question in the case of M.R. NARAYANAN vs. STATE reported in 2003 CRI. L.J. 1472.

The Division Bench, while considering the provisions of section 439 (1) and 437 (3) held that the Court is empowered to impose conditions while releasing the accused on bail and that imposition of condition precedent in the form of deposit of amount is onerous, harsh and makes the order of bail illusory. The Court, while granting bail, will not go into recovery of the amount as a condition precedent for grant of bail.

26. It is thus very clear that section 441 Cr. P.C. does not contemplate cash deposit. Section 445 Cr. P.C. firstly gives the option to the accused to offer cash security in lieu of executing a bond and then the discretion is with the Court either to permit such cash deposit or to refuse it but the Court on its own cannot direct deposit of cash security.

27. In the opinion of this Court, therefore, the condition imposed by the learned Chief Judicial Magistrate, Surat requiring the accused-Revisioner to deposit an amount of Rs.1 lakh as cash security/surety with Court as a condition for release on bail is not proper or legal, and cannot be sustained.

28. Coming to the question whether the order requiring the accused-Revisioner to deposit Rs.23 lakh with the Department in the first instance as a condition precedent for release on bail and then to deposit the remaining amount of the 25% of the duty evasion can be said to be proper this Court is at a loss to understand as to under which provision of law or in exercise of which power this condition is imposed or direction is given. It has to be remembered that these are criminal proceedings, and while considering the question of bail, the Court may not exercise the power in a manner to recover the amount. For recovery of the duty allegedly evaded, there is a separate machinery established by law and thus direction of deposit of 25% out of which Rs. 23 lakhs to be deposited upfront as a condition precedent in addition to bond, surety and cash security is far from a condition to prevent such recurrence. Discretionary power of Court to impose conditions while releasing an accused on bail are to be exercised with judicial discretion. A criminal court cannot exercise such powers for recovery of amount.

28.1 It is true that the learned Magistrate has observed that these conditions are imposed with a view to ensure that accused-Revisioner does not involve in the same offence. However, direction to deposit the amount with concerned department [though under protest] and not

with Court, and direction to compute the amount to be deposited on basis of 25% of "duty evaded" reflect that duty evasion is accepted by the learned Chief Judicial Magistrate. It also reflects anxiety and enthusiasm to secure dues of the Department. Otherwise there was hardly a possibility of recurrence as licences of the Company have already been suspended since May 27, 2002, which aspect is not considered by the learned Chief Judicial Magistrate. It is, therefore, not possible to accept that the conditions are imposed to prevent recurrence.

28.2 It would be appropriate to refer to the decision of the Apex Court in SREENIVASULU REDDY vs. STATE OF TAMIL NADU [2001 AIR SCW 2381] where in a very similar situation, it was observed that object of putting conditions while granting anticipatory bail should be to avoid the possibility of person hampering investigation, to ensure that the accused does not abscond or otherwise misuse liberty.

28.3 In M.R. NARAYAN vs. STATE [2003 CRI.L.J. 1472], a Division Bench of Delhi High Court has also held that purpose of imposing conditions which are envisaged in sec. 437 (3), 438 (2) or 439 (1) cannot be such, the object of which should be to recover the alleged amount.

28.4 In the opinion of this Court, therefore, the condition of pre-deposit of Rs. 23 lakhs and further deposit of the remaining amount of 25% of the evaded duty [which is not yet exactly determined or adjudicated] is neither proper nor legal, nor can it be said to have been imposed in exercise of judicial discretion. It cannot be sustained.

28.5 It has also to be noted that imposition of conditions by Court and undertaking volunteered by accused are two distinct situations, and cannot be expected to be given same meaning, treatment and interpretation. In the case of Sreenivasalu [supra], Apex Court did not interfere with orders as it was on the basis of undertaking. But case here is different.

29. The ultimate outcome of the above discussion is that there is no case for cancellation of bail. Hence Criminal Misc. Application No. 7367 of 2003 must fail, and it stands rejected. Rule is discharged.

30. Learned Chief Judicial Magistrate, Surat has committed an error in imposing conditions of pre-deposit of Rs. 23 lakhs, deposit of the remaining amount of the

25% of the alleged evaded duty within three months of the release and in directing for cash surety of Rs. 1 lakh. These conditions therefore cannot be permitted to stand and are set aside. Order dated 10.9.2003 of learned Chief Judicial Magistrate, Surat granting bail to the accused-Revisioner shall stand modified to be read without these conditions. The remaining order and conditions of the said order stands confirmed. Criminal Revision Application No.455 of 2003 is, therefore, accordingly allowed. Rule made absolute accordingly. D.S.

[A.L. DAVE, J.]
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FURTHER ORDER:

31. On pronouncement of this order, learned counsel Mr. Asim Pandya requests that the operation of this order may be suspended for a period of two weeks to enable the Department to approach the higher forum. He was, however, at a loss to indicate under which provision such relief can be granted. Further, when the Magisterial Court has deemed it fit to grant bail to the Revisioner and this Court has also found that there is no case for cancellation of bail, suspension of this order for a period of 15 days would curtail liberty of the Revisioner. So far as the condition regarding deposit of amount is concerned, that would be a matter that can be considered by the Apex Court and the Revisioner may be put to terms if deemed fit and proper. Under the circumstances, this Court is not included to accede to the request made by Mr. Pandya.

[ A.L. DAVE, J. ]
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